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No. 95-530

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY,

Petitioner,

vs.

KARL W. GREEN,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

NORMAN R. MUELLER
(Counsel of Record)
HADDON, MORGAN & FOREMAN, P.C.
150 East Tenth Avenue
Denver, Colorado 80203
(303) 831-7364

JOHN ROSSI
MORRISARD, ROSSI, COX,
KIKER & INDERWISH, P.C.
12203 East 2nd Avenue
Aurora, Colorado 80011
(303) 366-3501

Counsel for Respondent

October 31, 1995

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Karl W. Green ("Mr. Green"), plaintiff in the trial court, respectfully requests that the Petition For Writ Of Certiorari filed by the Denver & Rio Grande Western Railroad Company ("the Railroad") to review the judgment of the Tenth Circuit Court of Appeals be denied. The Court of Appeals correctly decided the evidentiary issue presented in conformity with precedent of this Court. Likewise, every circuit court of appeals which has addressed the issue is in agreement. The Petition For Writ of Certiorari should be denied.

STATEMENT OF THE CASE

Mr. Green was working as an engineer for the Railroad when he was injured during the graveyard shift on June 20, 1988. That night Mr. Green was operating a switching engine at one end of a train when he struck his head after being thrown from his pedestal seat by the unexpected movement of the train. A number of mental health professionals concluded that Mr. Green had suffered a brain injury in the accident and was significantly impaired. Mr. Green sued the Railroad under the provisions of the Federal Employers Liability Act, 45 U.S.C. § 51 *et seq.* ("FELA"), arguing that the Railroad was liable for his injuries because the safest method had not been employed in moving the train and various safety and operating rules had been violated.

Arguing that no safety rules had been violated, the Railroad contended it was not negligent. The Railroad

also claimed that Mr. Green's condition was not consistent with his having suffered a major head injury in the accident and that his psychological problems were the result of preexisting depression.

Prior to trial, Mr. Green filed a motion in limine pursuant to this Court's holding in *Eichel v. New York Central R.R.*, 375 U.S. 253 (1963), to preclude evidence that he was receiving disability payments under the Railroad Retirement Act. The Railroad opposed the motion, arguing that the disability benefits were not a collateral source and any damage award should be offset by the amount of benefits received by Mr. Green. Ultimately, the Railroad took the position that evidence of disability payments should be presented to the jury.

Although the district court, after reviewing *Eichel*, initially agreed that evidence of the disability payments should not be heard by the jury, it took Mr. Green's motion under advisement. The next day, the district court reversed course, ruled that the evidence of the disability payments was admissible and denied Mr. Green's motion in limine. The trial court informed Mr. Green he could deal with the ruling by either of two approaches. First, Mr. Green's economist could alter his damage calculations by deducting the disability payments and attempt to avoid mentioning the payments during his testimony. Alternatively, Mr. Green could present his evidence of damages as originally calculated, and the jury could then hear evidence of the disability payments. The district court made it clear Mr. Green could choose either alternative method of dealing with the ruling and preserve his claim of error.

After presenting expert testimony concerning damages, Mr. Green's attorney informed the court he had chosen the alternative of presenting evidence of the disability payments, again confirmed his continuing objection to the evidence and sought assurances that this course of action preserved the claim of error to the admission of this evidence. The district court reaffirmed that Mr. Green had preserved his objection to the evidence.[1] (Pet. App. pp.5a-6a)

After trial, the jury returned a verdict in favor of the Railroad. The Tenth Circuit reversed the judgment of the district court. *Green v. Denver & Rio Grande Western R. Co.*, 59 F.3d 1029 (10th Cir.1995). Following this Court's holdings in *Eichel* and *Tipton v. Socony Mobil Oil Co.*, 375 U.S. 34 (1963), the Court of Appeals concluded that "the collateral source rule prohibits admission of [Railroad Retirement Act] disability benefits in a FELA case." 59 F.3d at 1033 (Pet. App. p.8a)[2]

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[1] Despite this clear record, the Railroad argued on appeal that Mr. Green had failed to preserve his objection to the evidence of payments from a collateral source. The Tenth Circuit quickly rejected that argument. 59 F.3d at 1031-32 (Pet. App. pp.4a-6a)

[2] Since the Court of Appeals ordered a new trial, it found it unnecessary to address the argument that the district court also had erred by refusing to allow one of Mr. Green's expert witnesses to testify. 59 F.3d at 1030 (Pet. App. p.2a) If this Court grants certiorari and reverses the Court of Appeals, that issue would need to be resolved on remand.

REASONS THE PETITION SHOULD BE DENIED

1. The decision of the Tenth Circuit is controlled by *Eichel v. New York Central R.R.*, 375 U.S. 253 (1963), and the Railroad has failed to present any compelling argument that *Eichel* should be overruled.

The Railroad concedes that the decision of the Tenth Circuit Court of Appeals is in conformity with this Court's opinion in *Eichel*. (Pet. p.11) Nevertheless, the Railroad seeks certiorari on the evidentiary issue presented by this case, asking this Court to overrule what it characterizes as the "dicta"[3] in *Eichel*.

In *Eichel* the defendant railroad sought to introduce evidence of plaintiff's disability benefits under the Railroad Retirement Act, 45 U.S.C. § 231 *et seq.* ("RRA"), as bearing on the extent and duration of the disability suffered by the plaintiff. On the way to rejecting the railroad's argument, this Court noted that the railroad did "not dispute that it would be highly improper for the disability pension payments to be considered in mitigation of the damages suffered by petitioner." *Eichel*, 375 U.S. at 254. Leaving no room for doubt as to the basis for its decision, this Court explained "the likelihood of misuse by the jury clearly outweighs the value of this evidence . . . petitioner's receipt of collateral social insurance

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[3] The Tenth Circuit rejected the Railroad's characterization of the *Eichel* Court's holding as dicta. The court recognized that this Court's conclusion that Railroad Retirement Act benefits could not be considered in mitigation of damages caused by the railroad was necessary "to the holding that admission of evidence of those payments to prove malingering was not harmless." 59 F.3d at 1033 (Pet. App. pp.8a-9a)

benefits involves a substantial likelihood of prejudicial impact." *Id.*, 375 U.S. at 255.

The Railroad attacks the holding in *Eichel* that disability benefits under the RRA fall within the collateral source rule. The Railroad's argument appears limited to the fact that it is mandated by federal law to contribute to the RRA fund. However, a major source of revenue for that fund is the tax imposed on railroad employees. 26 U.S.C. § 3201. Other than baldly asserting at trial that RRA benefits should not be included in the collateral source rule, the Railroad presented no factual basis to support its argument. This Court obviously was aware of the funding scheme for the RRA when it reached the contrary conclusion and quoted with approval from *New York, N.H. & H.R. Co. v. Leary*, 204 F.2d 461, 468 (1st Cir.), *cert. denied*, 346 U.S. 856 (1953):

> The benefits received under such a system of social regulation are not directly attributable to the contribution of the employer, so they cannot be considered in mitigation of the damages caused by the employer.

Eichel, 375 U.S. at 254.

To the extent the Railroad's petition seeks to challenge the collateral source rule itself, it is not an issue preserved for review. The Railroad did not mount such a challenge in either the district court or the Tenth Circuit and is precluded from doing so at this late date. *Department of Revenue of Montana v. Kurth Ranch*, 114 S.Ct. 1937, 1942 n.9 (1994) (Supreme Court will not consider issue not raised in trial court or Court of Appeals).

The decision by the Tenth Circuit is in accord with *Eichel* and the Railroad has failed to present any compelling argument that *Eichel* should be overruled.

2. The opinion of the Tenth Circuit is in conformity with other federal circuit courts which consistently have followed *Eichel*.

The Railroad also complains about the adherence the circuit courts of appeals have demonstrated to the *Eichel* ruling. The Railroad suggests that this consistent application of *Eichel* is not warranted, claiming that the Court in *Eichel* did not "fully analyze" (Pet. p.6) the issue. However, the conceded lack of a conflict in the circuits illustrates why the petition for certiorari should be denied. *See* Supreme Court Rule 10(a).

The continuing vitality of the *Eichel* rule has been recognized throughout the circuits. Evidence of collateral source payments are inadmissible in FELA cases. *Reed v. Philadelphia, Bethlehem & New England R. Co.*, 939 F.2d 128, 134 (3rd Cir.1991) (railroad's reference to disability benefits in closing argument reversible error even when in response to improper closing argument by plaintiff), *cert. denied*, 113 S.Ct. 1584 (1993); *Stillman v. Norfolk & Western Ry. Co.*, 811 F.2d 834, 838 (4th Cir.1987) (since defendants in FELA cases are not permitted to inform jury of benefits received by plaintiff from collateral source, there is no reason for different rule when plaintiff seeks to inform jury of absence of benefits); *Wilcox v. Clinchfield R. Co.*, 747 F.2d 1059, 1060 (6th Cir.1984) (recognizing that the rule of *Eichel* is "firmly established law," reversed judgment for railroad due to trial court's response to jury

question informing jury of existence of collateral source benefit); *Vanskike v. ACF Industries, Inc.*, 665 F.2d 188, 200 (8th Cir.1981) ("collateral source payments inadmissible *per se*"), *cert. denied*, 455 U.S. 1000 (1982); *Sheehy v. Southern Pac. Transp. Co.*, 631 F.2d 649, 651-52 (9th Cir.1980) (rejecting argument that *Eichel* rule was displaced by Fed.R.Evid. 403 and holding that limiting instruction did not cure error resulting from evidence of collateral benefits introduced to show malingering).

The prejudicial impact of evidence concerning collateral source benefits also has been recognized in cases other than FELA actions. For example, the Fifth Circuit, relying on *Eichel*, held that evidence of disability benefits is inadmissible in a Jones Act case. *Phillips v. Western Co. of North America*, 953 F.2d 923, 929 (5th Cir.1992). *See also In re Air Crash Disaster Near Chicago, May 25, 1979*, 803 F.2d 304, 309 (7th Cir.1986) (in wrongful death action, trial court did not abuse its discretion in determining prejudice of evidence of insurance benefits outweighed any probative value). Prior to this case, the Tenth Circuit also recognized the continued validity of the *Eichel* rule in *Higgins v. Martin Marietta Corp.*, 752 F.2d 492, 497 (10th Cir.1985), a case for damages for exposure to toxic gas, citing *Eichel* and stating: "clearly, reference during trial to the plaintiff's receipt of collateral benefits is not allowed."

To the extent the Railroad is arguing simply that any recovery should be offset by RRA benefits received by Mr. Green, it is not an issue presented by this case. The Railroad was not content at trial to settle for a post-verdict offset from any damage, nor did the district court so insulate the jury from its ruling. The issue in this case

resolved by the Court of Appeals is whether it is prejudicial error to present evidence of the RRA benefits to the jury. Courts consistently have found such evidence to be prejudicial and the Tenth Circuit agreed.

3. The decision of the Tenth Circuit is not at odds with other decisions of that court.

Having conceded the decision of the Tenth Circuit is in accord with *Eichel* and all circuit court cases which have addressed this evidentiary issue, the Railroad attempts to manufacture an inconsistency between this decision and other cases from the Tenth Circuit dealing with the application of the collateral source rule in other contexts. No such conflict exists.

The Railroad's argument was addressed and answered in the Court of Appeals' opinion. The court noted that "[o]ur cases have always treated payments from the public treasury, at least when funded by a tax scheme to which the injured party contributed, as from a collateral source." 59 F.3d at 1032 (Pet. App. p.6a) However, the court noted that some confusion may have been created by decisions in two cases involving claims under the Age Discrimination in Employment Act in which the court treated the use of benefit payments to reduce back pay judgments against defendants as a matter of trial court discretion. *See EEOC v. Wyoming Retirement System,* 771 F.2d 1425, 1431-32 (10th Cir.1985) (social security payments); *EEOC v. Sandia Corp,* 639 F.2d 600, 625-26 (10th Cir.1980) (state unemployment compensation benefits). In contrast, in *Berg v. United States,* 806 F.2d 978 (10th Cir.1986), the court had not viewed the issue of

setoff as a matter of trial court discretion in concluding that Medicare benefits derived in part from social security taxes paid by the plaintiff were collateral and could not be used to reduce the judgment against the United States.

As the Tenth Circuit recognized, none of those cases involved RRA benefits, which this Court has concluded are covered by the collateral source rule. Thus, any confusion created by the two age discrimination cases was unimportant to the resolution of this case. 59 F.3d at 1032.[4]

In addition, there is an important distinction between the two age discrimination cases and the instant case. *Wyoming Retirement System* and *Sandia Corp.* involved trials to the court in EEOC actions. Whether or not the trial court ultimately reduced a back pay judgment by the amount of benefits received, there was no danger of prejudicing a jury with such evidence.

The Railroad also argues, without benefit of authority, that the Tenth Circuit's "allegiance to *Eichel* deprives railroad defendants of equal protection of the laws." (Pet. p.20) First, the Railroad never made that argument previously in this case. This Court will not consider an argument advanced for the first time in the petition for certiorari. *Kurth Ranch,* 113 S.Ct. at 1942 n.9. Moreover, the Railroad is not being treated differently than any

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[4] Even if there was a conflict between decisions rendered by the Tenth Circuit, it would not be a sufficient basis for granting a writ of certiorari. *See Davis v. United States,* 417 U.S. 333, 340 (1974). Such differences normally are resolved by the Court of Appeals itself.

other railroad which has been held liable in an FELA action for injuries caused a worker who receives RRA disability benefits. No railroad employer is permitted to reduce the compensation owed an injured employee by the amount received by the worker from the collateral source of RRA benefits.

4. The Tenth Circuit's conclusion that the error here was prejudicial is consistent with every circuit court decision which has addressed the issue. Moreover, a harmless error analysis relating to an evidentiary issue is not a subject which warrants certiorari review.

The Railroad claims that the decision of the Tenth Circuit finding reversible error is inconsistent with "the decisions of other circuits, and the decisions of this Court." (Pet. p.21) That claim simply is not accurate. This Court and every circuit court of appeals that has addressed the question have concluded it is prejudicial for a jury to hear evidence of collateral source payments in an FELA action.

In *Tipton*, 375 U.S. at 36-7, this Court rejected the argument that admission of evidence of other compensation benefits was harmless error. As explained in *Reed*, 939 F.2d at 134, the *Tipton* Court did not "limit the application of the collateral source rule to the damage phase of the trial and noted that the jury was led to place undue emphasis on the compensation benefits in determining a liability issue." More recently, the Fifth Circuit in *Phillips*, 953 F.2d at 929-30, rejected the defendant's argument that the erroneous admission of such evidence was harmless error since the jury returned a verdict of no negligence,

even though the court recognized that evidence of negligence was "slim."

> It is undoubtedly true that knowledge that an injured plaintiff has resources available to compensate him for his loss, separate from the defendant, may divert the jury's attention from its narrow task of determining whether the defendant was negligent. The jury may feel that awarding damages would overcompensate the plaintiff for his injury (even though the defendant would only pay once), and may factor this into the liability calculus. This concern compels us to reject [defendant's] suggestion that, even if introduction of evidence of post-accident benefits was error, it had no effect on the jury's finding of no negligence and therefore constituted a form of harmless error.

See also Doucet v. Gulf Oil Corp., 783 F.2d 518, 523 (5th Cir.), *cert. denied*, 479 U.S. 883 (1986) ("[E]ven an argument by counsel that the plaintiff in a tort suit will receive workers' compensation is so prejudicial as to warrant a new trial. . . . ").

The court in *Sheehy*, 631 F.2d at 652-53, agreed that the mistaken admission of evidence of other compensation benefits was reversible error in a FELA action where the jury returned a verdict for the railroad, even though the trial court attempted a limiting instruction. As the Court explained, "the verdict could very well have been adversely affected . . . since the plaintiff recovered nothing." *See also Wilcox*, 747 F.2d at 1061-62 (new trial awarded after the jury returned a verdict for the railroad because the trial judge informed the jury that plaintiff

had received payment for medical expenses and "last time worked").

In *Simmons v. Hoegh Lines*, 784 F.2d 1234, 1237 (5th Cir.1986), the Fifth Circuit concurred that the introduction of evidence of collateral benefits is not harmless. As succinctly summarized by the court, "because juries will be more likely to find no liability when they are aware that the plaintiff has already received compensation," the receipt of such evidence is reversible error.[5]

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[5] The Tenth Circuit discussed most of these cases in reaching the conclusion that the error in this case was not harmless. 59 F.3d at 1033-34 (Pet. App. pp.9a-11a).

CONCLUSION

The decision by the Tenth Circuit is in accord with *Eichel* and with the many other circuit court decisions which have addressed the same issue. Since there is no conflict with this Court or other circuit courts of appeals and no compelling argument has been presented that *Eichel* should be overruled, no reason exists for this Court to grant certiorari under Rule 10. The Railroad's petition should be denied.

Dated: October 31, 1995.

Respectfully submitted,

NORMAN R. MUELLER
(Counsel of Record)
HADDON, MORGAN & FOREMAN, P.C.
150 East Tenth Avenue
Denver, Colorado 80203
Telephone: (303) 831-7364

JOHN ROSSI
MORRISARD, ROSSI, COX,
KIKER & INDERWISH, P.C.
12203 East 2nd Avenue
Aurora, Colorado 80011
(303) 366-3501

Counsel for Respondent